UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

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NATIONAL LABOR RELATIONS BOARD
Petitioner, Docket No. 14-3978-ag

v.

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY
Respondent.

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PETITION FOR PANEL REHEARING AND

PETITION FOR REHEARING EN BANC

Respondent files this Petition for Panel Rehearing and Petition for Rehearing En Banc pursuant to FRAP 35 and 40 and Local Rules 35.1 and 40.1 on the basis that the decision of the panel is inconsistent with prior decisions in this Circuit, fails to take cognizance of an order of this Circuit decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), and did not consider that the holding of the National Labor Relations Board ("NLRB") enforced by this Court is inconsistent with well-established precedent of the United States Supreme Court.

The NLRB found, and this Court agreed, that granting industry seniority to employees who work in certain job classifications in collective bargaining

agreements between employers and the Respondent unlawfully encouraged union membership in violation of Section 8(b)(2) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(b)(2), under the circumstance that the employers are no longer part of a multi-employer bargaining unit. The rationale is that employees who work for non-unionized employers and employees who are in job classifications that are not eligible for industry-wide seniority and are not required to become members of the Union under the applicable collective bargaining agreement are the victims of this unlawful discrimination.

This Court held in *NLRB v. Local 6, Typographical Union,* 632 F.2d 171 (2nd Cir. 1980), however, that a union that gives preference to hiring hall applicants based on time worked under a union contract with varying employers does not violate Section 8(b)(2) because, as here, preference was given based on time under a collective bargaining agreement, not on time in the Union and there was no showing of an intent to discriminate.

Moreover, this Court in *Patterson, et al. v. NMDU* et al., 514 F.2d 767, 770 (2nd Cir. 1975) enforced an order under Title 7 of the Civil Rights Act requiring the Union to adopt the very seniority system at issue in this case.

Finally, the NLRB's rationale for its finding of a violation of Section 8(b)(2) of the Act is inconsistent with well-established precedent under Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3). Section 8(b)(2) condemns action by a labor

organization that causes or attempts to cause an employer to violate Section 8(a)(3). Section 8(a)(3) states that it is an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Therefore, if the action of the Respondent in this case in agreeing to the seniority system involved herein did not cause the Times and the Post to unlawfully encourage or discourage union membership in violation of Section 8(a)(3), a fortiori the Union cannot be in violation of Section 8 (b)(2).

It is well-established that if employer action affects the employment of all members of a bargaining unit, a violation of Section 8(a)(3) is not thereby established absent specific proof of unlawful intent to discriminate. An employer that locks out all unit employees, for example, is not violating 8(a)(3), because even if such action discourages membership in the collective bargaining unit, it does not unlawfully discourage union membership because union members and non-members are treated equally and the employer has a legitimate reason to do so. *American Ship Bldg Co. v. NLRB*, 380 U.S. 300, 312 (1965). The NLRB has similarly held that an employer lawfully may exclude all bargaining unit employees from the pool of employees it considers for replacement jobs during a lockout in order to run its business during the lockout. *Inland Trucking Co*. 179 NLRB 350 (1969) enforced 440 F. 2d 562 (7th Cir.) *cert denied*, 404 U.S. 858

(1971) In both cases the employer is taking action that would discourage membership in the collective bargaining *unit,* not membership in the *union*, and in both cases, no violation of the National Labor Relations Act was found. Similarly, employer action that benefits all employees in a bargaining unit, vis-à-vis those who are not in the unit, would not violate Section 8(a)(3) absent proof of unlawful intent to discriminate.

In the instant case, industry-wide seniority was given based on time in a qualified job classification (regularly employed employees) over employees working for employers who do not have agreements with the Union and employees in another job classification (casual employees). The Board found that industry-wide seniority was given to all employees in the designated job status whether they were union members or not. Nor can there be any doubt that in trying to preserve the remaining jobs for experienced, long standing bargaining unit members in an industry being decimated by alternative means of news distribution, the Union was acting for a legitimate and lawful objective.

The Board alleges that two groups of employees were unlawfully encouraged to become Union members. One group consists of employees of non-signatory employers. Such employees, at most, would be "encouraged" to become *unit* members, not *union* members. Moreover, such "encouragement" would occur as to all conditions under a collective bargaining agreement, including

advantageous wage rates and employee benefits. The fact that the seniority was industry-wide, as in this case, rather than employer-wide, as the NLRB Order requires, has nothing to do with whether employees of non-signatory employers would be unlawfully "encouraged" to join a unit represented by the Union.

The second group of employees allegedly "encouraged" to join the Union are unit employees who are essentially casual employees and not in a job status granted industry-wide seniority under the applicable collective bargaining agreements and not subject to the contractual requirement to join the Union. Of course, seniority systems benefit long term employees to the detriment of shorter term employees. A union does not necessarily breach its duty of fair representation when it makes judgments regarding how seniority systems are to be administered. As the Supreme Court has stated, "Inevitably differences arise in the manner and degree to which terms of any negotiated agreement affect individual employees and classes of employees… Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed…and…the time at which it is done…" *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338-339 (1953).

Therefore, under relevant Section 8(a)(3) precedent, no Section 8(b)(2) violation may be found in this case because there was no encouragement or discouragement of union membership. The Court relied upon *Interstate Bakeries*

Corp, 357 NLRB 15 (2011) enforced *sub nom NLRB v. Teamsters Local Unio*n 488 F. App'x 280 (10th Cir. 2012). While the Tenth Circuit adopted the Board's rationale in a case similar to the one at bar, the First Circuit rejected this rationale in *NLRB v. Whiting Milk Corp.* 342 F. 2d 8 (1st Cir. 1965). Moreover, the Tenth Circuit did not consider the fact that its holding finding the Union in violation of Section 8(b)(2) of the Act was inconsistent with established precedent under Section 8(a)(3).

In the context of the free-falling decline of the newspaper delivery business, the workers the Union represents, members and non-members alike, are desperately attempting to hold onto fewer remaining jobs. It is understandable that seniority plays a major role in that effort. Rewarding long term employees is what union contracts do. Furthermore, this is not a case in which the Union is attempting to impose a seniority system on unwilling employers. The employers willingly set up the instant system decades ago when many of them were part of a multiemployer bargaining unit. It was the employers, not the Union, that subsequently fragmented the multiemployer unit.

The NLRB admits that the industry-wide seniority system was lawfully established. All the Respondent and the employers did was implement the seniority system in an effort to protect long term employees, members and non-members alike.

Rather than permit these employees, union members and non-members alike, to enjoy their collective bargaining seniority, the NLRB has undermined the Act's stated purpose of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. In doing so, the NLRB has strayed from both the letter and the spirit of the Act it was created to enforce.

For the foregoing reasons, it is respectfully submitted that this Petition for Panel Rehearing and Petition for Rehearing En Banc should be granted.

Respectfully submitted,

LAW OFFICE OF DANIEL SILVERMAN LLP

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Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on April 7, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I also certify that the foregoing Petition(s) were served on all parties or their counsel of record through the CM/ECF system as all counsel are registered users.

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14-3978-ag
National Labor Relations Board v. Newspaper and Mail Delivers' Union of New York and Vicinity

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 22nd day of March, two thousand sixteen.

Present: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
Circuit Judges.
RICHARD K. EATON, [1]
Judge.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. 14-3978-ag

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY,

Respondent.

Appearing for Petitioner: Barbara A. Sheehy (Richard F. Griffin, Jr., Jill A. Griffin, Jennifer Abruzzo, John H. Ferguson, and Linda Dreeben, *on the brief*), National Labor Relations Board, Washington, D.C.

[1] The Honorable Judge Richard K. Eaton, of the United States Court of International Trade, sitting by designation.

Appearing for Respondent: Daniel A. Silverman, Brooklyn, NY.

Application for Enforcement of an Order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the application of the National Labor Relations Board to enforce its order is **GRANTED.**

Petitioner National Labor Relations Board ("NLRB") seeks enforcement of its order requiring Respondent Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU") to, among other things, cease and desist from engaging in unfair labor practices in its dealings with the New York Post (the "Post"), the New York Times (the "Times"), and City and Suburban Delivery Systems, Inc., ("C&S"), a former wholly-owned subsidiary of the Times that is now defunct. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Our review of an NLRB order is "highly deferential." *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008). We "must enforce the Board's order where its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). Thus, we may not "displace the Board's choice between two fairly conflicting views, even [if we] would justifiably have made a different choice had the matter been before [us] *de novo.*" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

On application to this Court, NMDU did not contest the Board's finding that NMDU violated Section 8(b)(1)(A) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(b)(1)(A), by threatening to interfere with the employment of Daniel Altieri, a former employee of C&S. The Board found that NMDU expelled Altieri from the union because it alleged he was six months or more in arrears in union dues and warned Altieri that, as a result of his expulsion, he was at risk of losing employment with any employer governed by a collective-bargaining agreement with NMDU. The NLRB found this notice was improper because "the fact that he was in arrears at his former employer cannot, under Board law, be used to preclude his employment at another employer covered by a contract in a separate bargaining unit." Special App'x at 23. Because NMDU did not contest this conclusion, "[t]he Board is entitled to summary affirmance of portions of its order identifying or remedying" this violation. *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009).

Substantial evidence in the record as a whole also supports the Board's conclusion that NMDU violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A) and (2), by causing or attempting to cause the Post, the Times, and C&S to discriminate against certain unit employees in violation of Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by giving priority hiring preference to nonunit individuals based on their union membership or prior employment with a union-signatory employer. It is well-established law that priority hiring preferences based on union membership violates Section 8(b)(1)(A) and (2) of the Act. *See, e.g.*, *Seafarers' Int'l Union*, 244 NLRB 641, 642 (1979). While "a bargaining representative for the employees of a

particular unit has the right to give an inferior seniority ranking to employees transferred from another unit," *Gen. Drivers & Helpers Local 229 (Associated Transt., Inc.)*, 185 NLRB 631, 631 (1970), a union may not cause or attempt to cause discrimination against an employee solely on the basis that the employee was not a member of the union or "had *not* been previously represented by the Union," *Interstate Bakeries Corp.*, 357 NLRB No. 4, at *5 (June 30, 2011), *enforced sub nom. NLRB v. Teamsters Local Union No. 523*, 488 F. App'x 280 (10th Cir. 2012).

The Board's decision in *Teamsters Local Union 896 ("Anheuser-Busch")*, 296 NLRB 1025 (1989), is not to the contrary. In that case, the employment preferences found permissible were "arguably skill based" and the preferences could not be secured "merely by joining the Union or by working for employers who have contracts with the Union." *Id.* at 1028. Additionally, among other things, "individuals claiming the [the hiring preference at issue] must also have worked a specific length of time to attain permanent employee status *and* thereafter have been laid off by a signatory employer." *Id.* By contrast, the contractual provisions at issue in this case are discriminatory on their face, unlawfully favoring individuals who were union members or who had worked for union-signatory employers for a longer period of time over non-union members or individuals who had not worked for a union-signatory employer.

NMDU argues that because the seniority list at issue was established more than six months prior to the filing of a charge, the complaints are time barred under Section 10(b) of the Act, 29 U.S.C. § 160(b). But the statute of limitations does not run from the date the seniority system was established; instead, it runs from the date that the charging employees were adversely affected by that system. *See Whiting Milk Corp.*, 145 NLRB 1035, 1037-38 (1964), *enforcement denied on other grounds*, 342 F.2d 8 (1st Cir. 1965). The issue is "not whether the [union] committed an unfair labor practice by inaugurating the policy, but whether it violated the law by continuing to maintain it; more specifically applying and giving effect to it in the lay-offs." *Potlatch Forests, Inc.*, 87 NLRB 1193, 1211 (1949), *enforcement denied on other grounds*, 189 F.2d 82 (9th Cir. 1951). Therefore, the charges at issue in this case are not barred by Section 10(b) of the Act.

Finally, substantial evidence in the record taken as a whole supports the Board's conclusion that the union breached its duty of fair representation by failing to provide notice to employees of their rights to not be full members of the union under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and failing to give notice that employees who are not full members do not have to pay the entire amount of dues that full members pay under *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988). NMDU concedes that it did not provide any *General Motors* or *Beck* notices to Post employees in bulletins other than a 2003 bulletin that was posted at the facility, and in response to a subpoena by the NLRB's General Counsel, NMDU did not provide any evidence of any notices provided to C&S employees before those employees became bound by the contractual union-security provisions. Given this lack of evidence, the Board was entitled to draw an adverse inference that NMDU failed to properly inform Post and C&S employees of their rights under *General Motors* and *Beck*. *See Cal. Saw & Knife Works*, 320 NLRB 224, 231 (1995), *enforced sub nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

For the foregoing reasons, and finding no merit in NMDU's other arguments, we hereby **GRANT** the NLRB's application for enforcement of its order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk